UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SWIFT TRANSPORTATION CO. INC.	)	
Respondent,	)	
and	)	Case No. 21-CA-38735
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	)	
Charging Party.	)	

BRIEF IN SUPPORT OF CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF THE ADMINSTRATIVE LAW JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE **PAGE**

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The International Brotherhood of Teamsters ("Teamsters" or "Union"), Charging Party herein, submits the following brief in support of the Teamsters' exceptions to the decision issued by Administrative Law Judge ("ALJ") Lana Parke in this matter.[1]

OVERVIEW

This case arises out of efforts by the Teamsters to organize drivers working for Respondent Swift Transportation Co., Inc. ("Swift") at a facility located in Wilmington, California. Swift is a non-union trucking company, operating nationwide. (Tr. 777-778). Drivers working out of the Wilmington facility primarily haul containers from the Ports of Los Angeles and Long Beach to locations within a one-hundred mile radius of the ports. (Tr. 100, 522, 620-623, 623, 703). The containers are twenty or forty foot boxes

[1] References to the record will appear as "Tr." followed by the pertinent page numbers. Those exhibits offered by Counsel for the General Counsel will be referred to as "GCX", those offered by Respondent Swift Transportation Co., Inc. as "RX" and those submitted jointly by all parties as "JX". References to Judge Parke's decision will appear as "ALJD".

that arrive at the Ports on container ships. (Tr. 521-522). The containers are placed on a chassis which is, in turn, hooked to a tractor trailer and then driven away from the port. (Tr.521-522).

Prior to 2008, Swift utilized the Wilmington facility as a trailer storage facility. (Tr. 777). However, in 2008, the Ports of Los Angeles and Long Beach enacted a Clean Trucks Program aimed at reducing air pollution by requiring motor carriers to phase out older trucks that failed to meet current emissions standards and replace them with new and retrofitted vehicles. In addition, the Clean Truck Program at the Port of Los Angeles initially required that all drivers hauling containers to and from the Port be employees, as opposed to independent contractors.[2]

The onset of the Clean Truck Program motivated Swift to convert the Wilmington facility from a storage yard to an active trucking terminal servicing the Ports of Los Angeles and Long Beach. Swift hired a number of employee drivers to work at the Wilmington facility. Hiring began in the fall of 2008 and by early 2009 the number of drivers had grown to approximately 160. The drivers at Wilmington worked a day shift starting at 7:00 a.m. and a night shift starting at 5:00 p.m. (Tr. 527-528, 623, 625). Brennan Obray served as the terminal manager at Wilmington. (Tr. 621).[3]

From the beginning the rate of pay was a source of frustration for drivers at Wilmington. Swift initially planned to pay drivers by the load. (Tr. 627-628). However, this proved unworkable because the recession in the national economy led to low

[2] Most port truck drivers are treated as independent contractors by the motor carriers that employ them. The employee driver requirement of the LA program was ultimately temporarily enjoined after the American Trucking Association filed suit claiming that the employee requirement, as well as other aspects of the CTP, violated the Commerce Clause and federal motor carrier statutes. *American Trucking Association v. City of Los Angeles, et. al.*, 559 F.3d 1046 (9th Cir. 2009)

[3] Swift concedes that Obray is a supervisor within the meaning of the Act.

container volumes. (Tr. 526). Swift responded to driver discontent over pay rates by instituting a guaranteed wage of $720 per week, regardless of the hours that the driver worked. (Tr. 629-630). Drivers complained that, while this meant that they earned the equivalent of $18 per hour for working less than 40 hours a week, they were not compensated for hours worked in excess of that once container volume began to increase. (Tr. 36, 67, 87, 145, 227, 285, 334, 410, 467). Swift responded in January 2009[4] by switching to $18 per hour for all hours worked. (Tr. 87, 229, 364, 406, 630). The constant tinkering with the pay system led to numerous errors in driver pay checks. Drivers often had no idea how they were being paid at any given point in time. (Tr. 227-228, 285, 334, 462, 467).

Dissatisfaction with pay rates led drivers to contact the Teamsters. In late November or early December 2008, several drivers formed an organizing committee. Among the drivers agreeing to serve on the committee were Anthony Herron, Bismark Sanchez and Marco Diaz. (Tr. 39-40, 319, 428-429). The organizing committee did not openly identify themselves to management. (Tr. 41, 234). It is clear that Swift nonetheless became aware of organizing efforts, since, in early January 2009, Obray told Herron that the Teamsters would never organize Swift and that Swift's owner, Jerry Moyes, would close the facility if he thought drivers were going to unionize. (Tr. 239-240).

The organizing committee began to discuss pay and other issues with their fellow drivers. (Tr. 37, 375, 413, 427). In January 2009, drivers began to approach Terminal Manager Obray, as well as Driver Manager ("DM") Jesus Tejeira, as a group to discuss

[4] Unless otherwise indicated all dates are in 2009.

various work related issues. (Tr. 42, 198, 430-431). [5] Herron, Sanchez, Diaz and another driver, Salvador Gonzalez, were involved, either individually or collectively, in most of these discussions. (Tr. 196-8, 413).

In mid-January 2009, Obray, apparently overwhelmed at the volume of complaints, suggested to Herron and others that drivers should select individual drivers to serve as the group's representatives to management. (Tr. 43, 146-7, 201, 234, 292, 342, 432, 724). Pursuant to this suggestion, approximately forty to sixty drivers gathered shortly thereafter and selected Anthony Herron, Bismark Sanchez and Marco Diaz, as well as fellow drivers Melvin English, Diego Lopez and a driver identified only as "Nick", to be their spokespersons. (Tr. 43- 44, 148, 203, 344, 434).

As the organizing activity at the Wilmington facility continued to escalate, so did Swift's unlawful response. During individual and group meetings, Swift management threatened to close the facility if the drivers chose union representation.

Beginning in February 2009, Swift began terminating those drivers most active in the organizing campaign. Anthony Herron was terminated on February 6, 2009 for allegedly failing to follow instructions and insubordination. (Tr. 650, JX # 12). Bismark Sanchez was terminated on February 9, 2009 for allegedly refusing to cooperate in the investigation regarding vandalism to Obray's car. (Tr. 223, 676, 903). Salvador Gonzalez and Marco Diaz were both terminated on February 24, 2009, for allegedly failing to reveal prior convictions on their application for employment. (Tr. 357-9, RX # 15; 807-9).

[5] The record evidence establishes that drivers had also approached Obray's predecessor, identified only as "Mack", as a group to discuss work-related complaints. (Tr. 430-1). The incidence of this activity, however, appears to have increased beginning in January 2008.

The Teamsters filed charges on February 27, 2009, alleging that Swift had committed various violations of §8(a) (1) of the National Labor Relations Act, 29 U.S.C. 158(a) (1), as amended ("the Act"). In addition, the charges alleged that Swift had violated §8(a)(3) of the Act, 29 U.S.C. 158(a)(3), as amended, by discharging Anthony Herron, Bismark Sanchez, Salvador Gonzalez and Marco Diaz in retaliation for their Union activities. In the alternative, the charge alleged that Herron, Sanchez, Gonzalez and Diaz had been discharged in retaliation for their concerted protected activities in violation of §8(a) (1).

The case was tried before Judge Parke on August 4 through August 10, 2009. Judge Parke issued her decision on December 9, 2009. In her decision Judge Parke found that:

(1) In mid-January 2009, Terminal Manager Obray unlawfully interrogated employees regarding their union activities. (ALJD, pp. 19, lines 42-51 to p. 20, lines 1-10).

(2) On February 11, 2009, Corporate Security Investigator Mark Donahue unlawfully interrogated employees regarding their union activities in February 11, 2008. (ALJD, p. 20, lines 12-52).

(3) On two occasions in February 2009, Terminal Manager Obray unlawfully implied that drivers would be terminated if they engaged in protected concerted activity or supported the Union. (ALJD, p. 22, lines 6-19).

(4) On two occasions in mid-February 2009, Terminal Manager Obray unlawfully told drivers that support for the Union was futile and threatened that Swift would

close the facility if drivers chose Teamsters representation. (ALJD, p. 22, lines 35-44; p. 23, lines 14-19).

(5) Swift unlawfully terminated Marco Diaz and Salvador Gonzalez in violation of §8(a) (1) and (3) in retaliation for their protected activity. (ALJD, p. 26, line 6– p. 29, line 38).

(6) Dismissed the allegations that Swift unlawfully terminated Bismark Sanchez and Anthony Herron on account of their protected activities. (ALJD, p. 23, lines 26- p. 26, line 2).[6]

ARGUMENT & ANALYSIS

The complaint alleges that Swift discharged Bismark Sanchez and Anthony Herron both because of their concerted protected activities and in retaliation for their activities on behalf of the Teamsters. The two allegations implicate different portions of the Act.

Section 7 of the Act guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining and other mutual aid or protection. . . ". Under §8(a) (1) an employer is forbidden from taking action to "interfere with, retrain, or coerce employees in the exercise of the rights guaranteed in section 7." Discharge for engaging in protected concerted activity violates §8(a) (1). *Manimark Corp.*, 307 N.L.R.B. 1059 at 1059 (1992); *Mike Yurosek & Son, Inc.*, 310 N.L.R.B. 831, 831-32 (1993).

[6] The ALJ dismissed allegations that Donahue unlawfully interrogated Marco Diaz on February 6, that Terminal Manager Obray unlawfully threatened Anthony Herron with termination for engaging in protected concerted activities, as well as that Swift owner Jerry Moyes created the impression of surveillance and threatened to close the Wilmington facility if employees chose union representation. (ALJD, pp.19-23).

In order establish a discharge in violation of §8(a)(1), the General Counsel must show that the employee engaged in concerted protected activity, that the employer knew of the concerted nature of the employee's activity and discharged the employee in retaliation for his concerted activity. *Meyer Industries, Inc.*, 268 N.L.R.B. 493, 497 (1984), *remanded*, *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948 (1985), *on remand*, 281 N.L.R.B. 882 (1986), *enf'd*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. den.*, 487 U.S. 1205 (1988).

Generally speaking, "concerted activity" is action which employees take as a group or activity which is the logical outgrowth of the concerted activity of other employees. *Meyer Industries, Inc.*, *supra.* at 497; *Corrections Corporation of America*, 354 N.L.R.B. No. 105 (2009), *sl. op.* at 25. Activity undertaken for the purpose of inducing or preparing for group action, even if undertaken by a single employee, is also "concerted activity", protected under the Act. *Dreis & Krump Mfg. Co.*, 221 N.L.R.B. 309, 310, 314-15 (1975) (employee leafleting fellow employees to protest supervisors actions engaged in protected activity); *Holling Press, Inc.*, 343 N.L.R.B. 301, 302 (2004) (reaffirming long standing precedent that "activity which in its inception involves only a speaker and a listener" constitutes concerted activity protected by the Act).

Activity is "protected" under the Act so long as it bears some relation to employee working conditions. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978) (activity is protected where it relates to "employees' interests as employees"); *Susan Oles, DMD*, 354 N.L.R.B. No. 13 (2009).

An employer is prohibited by § 8(a)(3) from discriminating with regard to hire, tenure or any other term or condition of employment in order to encourage or discourage

justification for the action taken. To avoid liability, an employer must demonstrate, by a preponderance of the evidence, that the articulated reason is the true one for the action taken. *Rose's Stores, Inc.*, 256 N.L.R.B. 550, 552 (1981); *W.F. Bolin Co.*, 311 N.L.R.B. 1118, 1119 (1993) *enf.* 70 F. 3d 863 (6th Cir. 1995). *See also NLRB v. Transportation Management*, 462 U.S. 393 at 401 (1983).

In determining whether a causal relationship exists between an employees' union sympathies and the employer's action, direct evidence of anti-union motivation is rarely available. Hence, it has long been held that discriminatory intent may be inferred from circumstantial evidence found in the record as a whole. *Asarco, Inc.,* 316 N.L.R.B. 636, 642 (1995). *See also Turnball Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985) (circumstantial evidence alone may be sufficient).

The absence of any legitimate basis for the employer's action may form a part of the General Counsel's case, since such evidence suggests the existence of an unlawful motive. *Wright Line, supra.* at fn. 12. *See also, Greco & Haines, Inc.*, 306 N.L.R.B. 634 (1992); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

I. The ALJ's Dismissal Of The Charge Relating To the Discharge of Bismark Sanchez Is Not Supported By The Record Evidence Or Applicable Law

Bismark Sanchez was hired in October 2008. (Tr. 193, 424). Jesus Tejeira, who worked as a Driver Manager (DM) at the Wilmington facility, described Sanchez as "a good driver." (Tr. 552).

The ALJ correctly found that Sanchez was an early supporter of the Union and openly participated in concerted protected activities during his tenure at Swift. Sanchez was among the drivers who began raising issues in a group with Terminal Manager Obray in early January 2009. (Tr. 196-198). There is no dispute that, on February 5,

2009, Sanchez took issue with a work assignment given him by DM Tejeira and engaged in protected concerted activity with several other employees to protest this assignment. (206-218, 442-444, 667-671; ALJD, p. 6, line 26 – p. 8, line 3).

There is no dispute that Terminal Manager Obray harbored animus towards Sanchez on account of the incident on February 5th. As the ALJ correctly noted, Obray testified that he felt "ambushed" and threatened during the grievance meeting with drivers over Sanchez's grievance. (Tr. 669-671; ALJD, p. 25, lines 2-5)

Aside from the grievance meeting on February 5th, the record is replete with evidence demonstrating animus towards drivers engaged in protected activity or exhibiting support for the Teamsters on the part of both Obray personally and Swift generally. The ALJ found that Obray unlawfully interrogated employees regarding their union activities, implied that drivers would be terminated for engaging in concerted protected activity or otherwise supporting the Teamsters' efforts to organize and threatened that Swift would close the facility if drivers chose Teamsters representation. (ALJD, pp. 19, lines 42-51-p. 20, lines 1-10;p. 22, lines 6-19, p. 22, lines 35-44-23, lines 14-19). In addition, Corporate Security Investigator Mark Donahue unlawfully interrogated employees regarding their union activities on February 11, 2008. (ALJD, p. 22, lines 6-19).

Under these circumstances, the ALJ correctly found that the General Counsel established a *prima facie* case that Swift was aware of Sanchez's protected concerted activity, bore animus towards Sanchez because of it and acted on that animus by discharging him on February 6. (ALJD, p. 24, line 40 – p. 25, line 5). The ALJ erred, however, when she concluded that Swift would have discharged Sanchez irrespective of

his concerted protected activities because of his supposed refusal to cooperate in Swift's investigation into the slashing of one of the tires on Obray's car while it was parked at the Wilmington facility. (ALJD, p. 25, line 7-p. 26, line 2).

Obray and Donahue testified that Sanchez had refused to cooperate with Donahue's investigation into the tire slashing. Sanchez denied that he had refused or failed to cooperate in Swift's investigation of the tire slashing.

Sanchez testified that what he had refused to do was to admit that he had been the one who had slashed the tire. According to Sanchez, when he refused to write out and sign a statement to that effect, he was terminated. The ALJ accepted Obray and Donahue's account of the termination because she "did not find Mr. Sanchez to be a reliable witness." (ALJD, p. 16, lines 38-39).

While the Board is not bound by an ALJ's findings, the Board is generally reluctant to overturn an ALJ's credibility determinations, given the ALJ's opportunity to observe the demeanor of the witnesses. *Standard Dry Wall Products*, 91 N.L.R.B. 544 (1950), *enf.* 188 F.2d 362 (3rd Cir. 1951). However, where a preponderance of the evidence demonstrates that the ALJ's credibility resolutions are incorrect, rest on considerations other than demeanor or lack substantial support in the record, the Board has not hesitated to reject the ALJ's conclusions and make its own findings of fact based on the record evidence. *Hadley Mfg. Corp.*, 108 N.L.R.B. 1641 (1954); *Russell Stover Candies, Inc.*, 221 N.L.R. B. 441 (1975); *Bralco Metals, Inc.*, 227 N.L.R.B. 973 (1977).

Sanchez testified extensively about two incidents: (1) his encounter with DM Tejeira and Obray on February 6 regarding Tejeira's work assignment and his participation in the subsequent meeting between Obray and other drivers regarding that

assignment and (2) his interview with Swift Corporate Security Investigator Mark Donahue and subsequent termination on February 9th. The record evidence regarding each incident demonstrates that, contrary to the findings of the ALJ, Bismark Sanchez's testimony is the more probable and credible version of events.

There was no dispute among the various witnesses that late in the day on February 6, Sanchez was assigned to pick up a container at the Port and that the chassis on which the container was set had a missing mudflap. (Tr. 206, 594). Sanchez testified that, upon discovering the problem, he took the load to Roadability, but found it closed for the day. (207).[7] Sanchez testified that, at that point, he called DM Tejeira, who directed him to return to the yard, stating that he would have the night driver fix the problem. Sanchez returned to the Wilmington facility, clocked out and began completing his paperwork for the day. (207-208, 243-244).

Tejeira claimed that he had learned about the missing mudflap from another driver and that this same driver had told him about a defective taillight on another of Sanchez's loads. (Tr. 551). Tejeira testified that he went looking for Sanchez, found him in the lunchroom and told him that he would have to get both containers repaired. (Tr. 552).

Sanchez did not deny that Tejeira had approached him and told him he needed to get both containers repaired (Tr. 208-209, 245). Sanchez testified that reminded Tejeira that he had been the one to tell Tejeira about the mudflap in the first place and that Tejeira had indicated that the night driver would get it fixed. Sanchez told Tejeira that he

[7] "Roadability" are maintenance facilities located at both Ports. There are multiple Roadability facilities at scattered about both Ports. (Tr. 579-580). It is standard procedure for a driver who notices a defect or problem in a container or chassis to take it to Roadability for repair. (Tr. 207).

knew nothing about broken taillight. (Tr. 208-209, 245). Sanchez told Tejeira that it was quitting time and he needed to pick up his son. (Tr. 209, 254).

At this point, both Sanchez and Tejeira agree that Tejeira reiterated that Sanchez would not only need to take both containers to get repaired but also deliver both loads to the rail yard that night, or "don't come back." (Tr. 208-209, 554, 596). Tejeira further testified that Sanchez responded to this by raising his voice and cursing, but Sanchez denied doing either. (Tr. 553-555, 254-255).

Clearly frustrated by his encounter with Tejeira, Sanchez left the lunchroom and went to Obray's office. Tejeira followed. There is no dispute that Sanchez related his earlier conversation with Tejeira to Obray, including Tejeira's threat to discharge him if he did not repair and deliver both containers that night. (Tr. 210-211, 245, 556). There is similarly no dispute that Obray initially agreed with Tejeira, insisting that Sanchez had to repair and deliver both containers or face termination. (Tr. 211, 557). All agreed that Sanchez protested that his service hours were almost up and that he needed to pick up his son. (Tr. 211, 559, 737). Obray and Tejeira both testified that Sanchez asserted that someone had "screwed with" his loads. (Tr. 557-664). Sanchez denied claiming that his load had been sabotaged. (Tr. 246).[8]

After some more discussion, Obray agreed that, while Sanchez would need to get both containers fixed, he would only be required to deliver one that evening. Sanchez agreed to this. (212, 258, 560).

[8] Ironically, according to Obray, Sanchez would have been justified in doing so. Obray conceded that there had been several instances of suspected container sabotage at the yard. (Tr. 753 - 755).

The only real dispute over what occurred in Obray's office is whether Sanchez raised his voice and used profanity during the meeting. Both Obray and Tejeira testified that he did. (Tr. 557). Sanchez denied that he did either. (Tr. 254-255, 258).

Sanchez left Obray's office and headed to get the container. On his way he encountered Anthony Herron and Marcos Diaz. Sanchez told Herron and Diaz about his encounters with Tejeira and Obray, including the threatened discharge. (Tr. 61, 212). Herron took issue with Obray's behavior and immediately called Obray to ask for a meeting to discuss the incident with Sanchez. (Tr. 442, 473, 668).

There is no dispute that Obray agreed to the meeting and came into the drivers area where he was surprised by the large number of drivers gathered there. Obray admitted that he was taken aback and that he told Herron (and the other assembled drivers) that this was "bullshit", that he didn't expect to be "ambushed" by a crowd and that he refused to speak to a "mob". (Tr. 669-671). Herron responded by suggesting that the night crew take care of both containers, since Sanchez had run out of hours. Sanchez repeated that he needed to pick up his son. (Tr. 387).

The discussion continued back and forth, with other drivers in the group voicing different concerns. (Tr. 443). In the end, Obray reiterated that Sanchez would need to deliver a single load. (Tr. 63, 103, 217). After this, Sanchez was able to get the mudflap repaired by mechanics at the Wilmington yard, but the taillight could not be fixed. When Sanchez informed Obray of this, Obray told Sanchez to go home. (Tr. 216-217). Though Obray testified he called Swift's headquarters in Phoenix that day to discuss the possibility of terminating Sanchez (Tr. 673), Sanchez was not terminated until four days

later. Swift has not asserted that the incident over the containers played any role in its decision to terminate Sanchez.

On February 5th, it was discovered that one of the tires' on Obray's vehicle had been slashed while parked at the Wilmington yard. Obray testified that he immediately concluded that Sanchez was responsible. Obray testified that he based this belief on the fact that Sanchez had precipitated the "ambush" with the other drivers that had occurred on February 5th. (Tr. 737-738). Obray called Mark Donahue, Swift's Corporate Security Investigator, that same day and reported the vandalism. Obray told Donahue that he suspected Sanchez and told Donahue about his "heated" encounter with Sanchez on February 5th. (Tr. 887, 890).

Donahue reviewed videos from surveillance cameras in the yard twice on February 5th – once at his office in Fontana, California and again with Obray at the yard in Wilmington. The tape showed an individual leaving the office and briefly pausing next to Obray's car, but the tape quality was too poor to identify the individual. (Tr. 888-890).

In addition to the reviewing the tapes, Donahue spoke on February 5th with driver Marco Diaz. Donahue began the conversation by asking Diaz about supposed threats made to another driver, Hugo Molina. But, Donahue soon turned the conversation to Sanchez's supposed involvement in the tire slashing. Donahue asked if Diaz knew Sanchez and Sanchez stated that he did. When Diaz commented that Sanchez was a nice guy, Donahue asked whether a nice guy would slash tires. (Tr. 73). Diaz responded that he found it hard to believe that Sanchez would do such a thing. (Tr. 73). Donahue then took Sanchez outside, pointed to the surveillance cameras and told Diaz that if Diaz could convince Sanchez to admit to the vandalism, Donahue would see that Sanchez was only

fired, not arrested. (Tr. 73). Donahue asked if Diaz "could read between the lines" and asked if Diaz knew whether Sanchez had slashed Obray's tire. (Tr. 74). Diaz responded by sighing, leading Donahue to comment that he took this as a "yes". When Diaz responded that he could not continue the conversation, the interview ended. (Tr. 74).

Donahue did not deny or otherwise contradict Diaz's testimony regarding Donahue's questions and comments concerning Sanchez. During direct examination by Swift's counsel, Donahue was asked whether, on February 5th, he asked Diaz "any questions related to your investigation into Mr. Obray's tire slashing?" (Tr. 896, lines 16-17), to which Donahue responded "I don't recall if I asked him or not." (Tr. 896, line 18).

The following Monday, February 9, Donahue interviewed Sanchez regarding the tire slashing incident. Sanchez testified that Donahue opened the meeting by boasting that he was a former FBI agent and a good interrogator. (Tr. 219, 221, 900). Donahue told Sanchez that he wanted to talk about the tire slashing and what occurred between Sanchez and Obray. (Tr. 221, 900). Donahue then told Sanchez that there was a videotape of Sanchez slashing Obray's tires, but when Sanchez demanded to see the video, Donahue replied that he was "not ready to show him." (Tr. 222, 901, 921).[9] Donahue then threatened to have Sanchez arrested. (Tr. 222). Despite this threat, Sanchez refused to falsely confess to the tire slashing. (Tr. 222).

At this point Donahue asked Sanchez to step outside of the room. (Tr. 223). Donahue contacted his supervisor, Shawn Driscoll, and, according to Donnie's testimony,

[9] Donahue admitted at the hearing that it was impossible to identify the person seen on the videotape. (Tr. 888-890). Hence, his statement to Sanchez that the tape showed Sanchez slashing the tire was an outright fabrication. As the General Counsel correctly noted in her brief to the ALJ, the Board has long held that an employer's sham investigation warrants an inference of unlawful motive. *Diamond Electric Manufacturing Corp.*, 346 N.L.R.B. 857, 861 (2006)

advised Driscoll Sanchez was uncooperative and upset. (Tr. 902). According to Donahue, Driscoll instructed him to give Sanchez a piece of paper and asked Sanchez to write out his version of events. (Tr. 902).

Donahue testified the he then invited Sanchez back into the room, gave him a blank piece of paper and ask him to write out his version of what had occurred on February 5. (Tr. 902). Donahue testified that Sanchez refused, stating the "I'm not giving you shit". (Tr. 903, line 3). Donahue testified that he asked Sanchez to step out of the room and then again conferred with Driscoll, who advised that Sanchez should be fired for failing to cooperate in the investigation. (Tr. 903).

Donahue testified that, after receiving these instructions, he asked Obray to come into the room. According to Donahue, he again gave Sanchez a chance to write out his version of events. (Tr. 903-904). When Sanchez again refused to do so, at which point Obray informed Sanchez that he was being terminated for failing to cooperate with the investigation. (Tr. 676).

Sanchez denied that Donahue handed him a blank piece of paper and asked for his version of events. According to Sanchez, after unsuccessfully trying to badger him into admitting to slashing the tires, Donahue asked him to step out of the room and, as Sanchez was leaving, Obray came into the office. There was a window into the room where Donahue interrogated Sanchez through which Sanchez observed Obray and Donahue talking. (Tr. 222-223; 274-275). Sanchez testified that after a brief period he was asked to step back into the room and that, when he did, Donahue handed him a prepared statement to sign in which Sanchez admitted slashing Obray's tire. (Tr. 223,

276). Sanchez refused to sign the statement. (Tr. 223, 276). At this point, Obray informed him that he was being terminated. (Tr. 223, 274-276).

The ALJ discredited Sanchez's testimony with regard to both the incident on February 5 and his February 9 termination. While the ALJ comments on Sanchez's credibility in her discussion of both incidents, her rationale as to why she found Sanchez less credible regarding the events of February 9 simply refers back to her earlier discussion of the February 5 incident.[10]

In crediting Tejeira and Obray regarding what happened on February 5, the ALJ writes that Tejeira and Obray were "forthright and clear about what had transpired, whereas Mr. Sanchez did not impress me as a reliable witness. (ALJD, p. 7, fn. 10, lines 37-38). The ALJ was not impressed with Sanchez because Sanchez testified that he never used profanity, yet other witnesses stated that they had heard Sanchez use profanity at work. The ALJ also finds that Sanchez "inaccurately reported" to Marco Diaz that Obray had directed him to deliver both loads, when Obray had only directed him to deliver one. Finally, the ALJ finds that Sanchez delayed delivering the one load he was assigned to deliver, which she finds undercuts Sanchez's claim of childcare issues. (ALJD, p. 7, fn. 10, lines 38-43).

The ALJ's treatment of the evidence regarding whether Sanchez cursed during his meeting with Obray on February 5 is not supported by the record evidence. There is an abundance of evidence suggesting that Obray and DM Tejeira's were less than candid in their testimony. For example, the ALJ credits Diego Lopez's testimony that Obray threatened that Swift would close the terminal if the drivers choose union representation,

[10] Regarding the evidence concerning Sanchez's termination, after reviewing the testimony of those involved, the ALJ comments "For reasons stated earlier, I did not find Mr. Sanchez to be a reliable witness. I accept Mr. Donovan and Mr. Obray's accounts of the termination meeting." (ALJD, p. 16, lines 38-39).

despite Obray's clear denial of this allegation. (ALJD, p. 13, lines 5-24 and p. 13, fn. 28). With regard to these and other threats made by Swift management, including Obray, the ALJ writes that she accepted the accounts of the General Counsel's witnesses "whose testimonies I found to be clear, candid, and reliable." (ALJD, p. 13, lines 18-19).

The ALJ's decision to credit Tejeira ignores the evidence that Tejeira deliberately lied to Diego Lopez about Hugo Molina reporting to management about drivers who were supposedly goofing off and not working. Lopez and Marco Diaz had subsequently asked Molina about this, which resulted in Molina complaining to management that he felt, threatened.[11] During his visit to the Wilmington facility on February 5th to investigate the tire slashing, Donahue learned of the allegations regarding Molina and set out to investigate them as well. (Tr. 891-892).

During the course of his investigation, Donahue interviewed Tejeira regarding the Molina incident. (Tr. 929-930). The record evidence demonstrates that, during this interview, Tejeira admitted that he was the one who told Lopez that Molina was making a list of and reporting to management about underperforming drivers, but that this was, in fact, not true. (Tr. 930). Donahue testified that Tejeira had confessed to Donahue that he had made the story up to "motivate" Lopez. (Tr. 930). Tejeira admitted he made it all up in a subsequent email to Donahue and Donahue reported Tejeira's confession in his final report closing the investigation into the incident. (Tr. 928, GCX # 4, GCX # 8).

On the witness stand, however, Tejeira insisted that he had not fabricated anything about Molina. (Tr. 613-614). Tejeira maintained this stance even when he was

[11] The allegation that Lopez and Diaz somehow threatened Molina played no role in the proceedings beyond Swift's attempt to use the allegations as cover for Donahue's unlawful interrogation of Lopez and Diaz regarding their union activities and as a thinly veiled effort at character assassination. The latter proved unsuccessful, as the ALJ generally credited testimony by Lopez and Diaz and ultimately found Diaz's termination to be unlawful.

confronted with his own email. (Tr. 614). Given this behavior, it is impossible to characterize Tejeira as a reliable witness under any circumstances.

The same analysis applies to Donahue's testimony. With regard to whether Donahue questioned Marco Diaz on February 11th regarding which employees were Union supporters, the ALJ noted that Donahue's account of the meeting "was significantly different from Mr. Diaz'." (ALJD, p. 9, lines 36-37). The ALJ then goes on to credit Diaz over Donahue, finding Donahue's testimony on the issue to be "somewhat vague and initially nonresponsive." (ALJD, p. 10, line 2).

Sanchez's account of his February 9th termination is inherently more probable than the account offered by either Obray or Donahue. Obray had told Donahue that he suspected Sanchez to be the culprit in the tire slashing. Donahue's general approach towards the drivers was one of a bully, boasting to Diaz that he was an ace interrogator and using sarcasm to ridicule the drivers, as when he told Diaz on February 11th that "For somebody that knows a lot, that everybody tells him things . . . answer me this question, who wants to start the Union?" (ALJD, p. 9, lines 13-15).

Donahue lied to Marco Diaz about there being a tape showing Sanchez slicing Obray's tire. (Tr. 73, 896; discussion pp. 15-16, *supra*). Sanchez testified that Donahue told him the same lie (Tr. 221-222) and Donahue actually corroborates Sanchez in this regard. On cross-examination, Donahue admitted that he told Sanchez that there was a video, that Sanchez demanded to see it and that Donahue refused to show it to him. (Tr. 921). Logically, Sanchez would only be interested in seeing the tape if Donahue had stated or implied that the tape showed Sanchez slashing the tire. Given these facts,

writing out a confession and then trying to bully Sanchez into signing it is the type of tactic that one would expect from Donahue.

The ALJ's citation to Sanchez's denial that he used profanity in his encounters with Obray and Donahue as evidence of Sanchez's lack of credibility is not supported by the record. While there is evidence that profanity was commonly used at the Wilmington yard,[12] it is not surprising that Sanchez, however much he may have cursed during the course of his job, would hesitate to do so when addressing management or agents of management, such as Donahue. In fact, Gonzalez testified that, contrary to Swift's witnesses, Sanchez did not curse during the group meeting on February 6th and that while he had heard Sanchez curse in the past, he had never heard Sanchez direct such language towards management. (Tr. 414-415).[13]

The ALJ also finds Sanchez's credibility suspect because Sanchez "inaccurately" reported to other drivers that Obray was requiring him to deliver both containers, when in fact Obray was only insisting he deliver one. (ALJD, p. 7, fn. 10, line 40). The evidence does suggest that Sanchez did not tell the other drivers that he had an agreement with Obray to deliver only one container. (Tr. 269-270). On the other hand, Mr. Sanchez did not try and hide this fact at the hearing, but admitted, when asked on cross-examination, that this had occurred. (Tr. 269-270).

The record is clear that Sanchez agreed to take one container because he feared termination if he did not. It is not clear what, if anything, motivated Sanchez's failure to

[12] Indeed, Obray himself confirmed that profanity was common at the yard (Tr. 725) and used it himself when confronted with the drivers' concerted activity on February 6th. (Tr. 604, 669-671).

[13] The ALJ's citation to Sanchez's testimony regarding profanity is curious in light of her rejection of Swift's argument that Sanchez's use of profanity was such that he lost the protection of the Act. See, ALJD at p.25, fn. 4. The ALJ's conclusion regarding this issue is clearly correct. *See, Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979).

tell the other drivers about his agreement with Obray, but whatever the reason, the ALJ's focus on this issue, makes no sense. For purposes of credibility, what is important is his behavior at the hearing. The record demonstrates that Sanchez testified truthfully under oath, even when it may have cast him in a bad light.

The ALJ's reliance on what Sanchez did or did not tell the other drivers appears to be based on the notion that, had the drivers known that Obray was only requiring delivery of one container, they would not have become upset and asked for a meeting. There is nothing in the record to support such a conclusion. It is clear from the record that drivers were generally upset regarding conditions at the Wilmington yard. The requirement that Sanchez take even one container, given the lateness of the hour and traffic conditions, would reasonably strike other drivers as unfair and provoke a protest (Tr. 210, 598-600, 746). Moreover, while the meeting began with a discussion of Sanchez's situation, the evidence establishes that it quickly moved into a general gripe session with drivers voicing their own particular complaints about working conditions at the yard. (Tr. 216).

Finally, the ALJ's conclusion amounts to a judgment about the wisdom of the drivers choice of this particular time and forum to lodge their grievances. The Board had long held that employees have a §7 right to assert grievances through concerted protected activity regardless of the merit (or lack thereof) of the particular grievance involved. *Johnnie Johnson Tire Co., Inc.*, 271 N.L.R.B. 293, 294 (1984), *enf*, 767 F.2d 916 (5th Cir. 1985). Similarly, the reasonableness or prudence of the method of protest adopted by employees does not determine the protected nature of the conduct. *Johnnie Johnson, supra*; *Lewittes Furniture Enterprises*, 244 N.L.R.B. 810, 815 (1979).

The ALJ questions the veracity of Sanchez's claim of childcare problems because, in her view, Sanchez unreasonably delayed delivering the container that Obray instructed him to deliver before going home. The ALJ's finding is unreasonable for two reasons. First, the ALJ appears to assume that, by asserting he could not stay later because of child care issues, Sanchez was arguing that he was facing some sort of child care emergency. Not only does the record evidence not support such a conclusion, it is entirely reasonable for Sanchez to cite his child care responsibilities even if being late to pick up his son did not create some type of emergency. Child care arrangements are always matters of concern for parents and child care providers generally expect parents to retrieve their children at the end of the work day.

Second, the ALJ ignores undisputed evidence that the impending darkness, weather conditions and general traffic conditions meant that the repair and delivery of the containers would take several hours. (Tr. 210, 598-600, 746). Thus, Sanchez was already in a situation where he was going to be very late picking up his son. Under the circumstances, Obray's requirement that Sanchez repair and deliver even one container was unfair and it is hardly surprising that Sanchez would have joined with his fellow employees in protesting this injustice.[14]

II. The ALJ's Dismissal Of The Charge Relating To the Discharge of Anthony Herron Is Not Supported By The Record Evidence Or Applicable Law

Anthony Herron was hired in August 2008 to work as a driver out of the Wilmington yard.

[14] The ALJ also appears to assume that Sanchez approached Herron and the other drivers and asked them to intervene on his behalf. The record does not support this interpretation. It appears that Sanchez simply related what he believed to be unfair treatment and that Herron took it from there.

The ALJ correctly found that Herron was an early supporter of the Union and openly participated in concerted protected activities during his tenure at Swift. Herron was among the drivers who began raising issues in a group with Terminal Manager Obray in early January 2009. (Tr. 430-431). There is no dispute that the drivers selected Herron to be one of their spokespersons. (Tr.44, 148, 203, 344, 434). Thereafter, Herron met with Obray to discuss driver issues. (Tr. 45-47). Herron initially acted as the driver's spokesperson during the February 5th protest over Obray's treatment of Sanchez. (206-218, 442-444, 667-671; ALJD, p. 7, line 11 – p. 8, line 3).

There is no dispute that Obray harbored animus over the February 5th incident. As the ALJ correctly noted, Obray testified that he felt "ambushed" and threatened during the grievance meeting with drivers over Sanchez's grievance. (669-671; ALJD, p. 25, lines 2-5). As outlined above, aside from the grievance meeting on February 5th, the record is replete with evidence demonstrating animus towards drivers engaged in protected activity or exhibiting support for the Teamsters on the part of both Obray personally and Swift generally. (See, pp. 9-10, *infra.*)

Under these circumstances, the ALJ correctly found that the General Counsel established a *prima facie* case that Swift was aware of Herron's protected concerted activity, bore animus towards Herron because of it and acted on that animus by discharging him on February 6. (ALJD, p. 23, line 26- p. 24, line 4). The ALJ erred, however, when she concluded that Swift would have discharged Herron irrespective of his concerted protected activities because of his repeated refusal to work more than eight hours per day. (ALJD, p. 24, lines 6-37).

As outlined above, the constantly changing pay system at the Wilmington yard was a source of dissatisfaction among the drivers. Herron was particularly unhappy with the flat-rate system introduced in which drivers were paid $720 per day, regardless of the actual hours they worked. In Herron's view, this meant that a driver working in excess of 8 hours a day was not being paid for all the hours that he worked. (Tr. 424, 467-468).[15]

Herron generally completed his paperwork and prepared to leave work around 3:30 p.m. each day. (Tr. 437). Herron testified that he never refused to work more than forty (40) hours a week (even though he believed he was not being paid for the extra time), never refused a load and never left work without authorization. (Tr. 464, 466).

DM Tejeira, however, testified that, beginning in November or December 2008, he discovered that Herron was abandoning his loads in the yard and leaving work early. (Tr. 535). Tejeira testified that he spoke to Herron about this on two separate occasions. Curiously, despite the fact that Tejeira believed Herron was deliberately neglecting his duties, Tejeira did not put any of these reprimands in writing or think to mention them to Terminal Manager Obray. (Tr. 538, 585, 587). This despite the fact that Swift has a progressive disciplinary system that applies to drivers at the Wilmington yard. (Tr. 707, 712).

According to Tejeira, in January 2009, Herron again dropped a load at the yard and went home. (Tr. 538). This time Tejeira reported the incident to Obray, but it is undisputed that Obray took no action against Herron or initiate any discipline against Herron under Swift's progressive disciplinary procedure. (Tr. 707, 712).

[15] Herron understood that, under Federal regulations, the drivers were not entitled to overtime at time-and-one-half. His issue was that drivers should be paid for all hours worked. (Tr. 467-468)

Shortly after this incident, Tejeira again reported to Obray that Herron was leaving early. Upon hearing this, Obray spotted Herron walking out the gate towards his car, followed him out and asked Herron where he was going. (Tr. 438, 640). Herron stated that he was done for the day and was taking a late lunch and then going home. (Tr. 438, 467, 471). Herron mentioned to Obray that he had completed his work for the day and turned in his paperwork. (Tr. 438, 467, 471). Obray did not dispute this, but told Herron that the other drivers were influenced by Herron and that Herron's actions were affecting driver morale. (Tr.438-439). Herron responded that he was there to work eight hours per day. (Tr. 439).

Obray testified that he threatened Herron with termination if he left early that day. (Tr. 641). Herron left anyway. Obray called Swift headquarters that day about terminating Herron, but was told to issue Herron a warning instead. (Tr. 644). Obray testified that he orally warned Herron the next day, but did not reduce anything to writing. (Tr. 644-645). Herron testified that he was not warned and did not perceive his earlier conversation with Obray as a warning because generally he and Obray had a good rapport with each other. (Tr. 469).

On February 5, Herron picked up a container of hazardous material at the port and brought it back to the Wilmington yard. Herron testified that, after dropping the load off, Tejeira cleared him to leave for the day. (Tr. 441-442, 448). Tejeira testified, however, that he never spoke to Herron that day and that Herron left early without permission. (Tr. 549). Later that evening, a night driver took the container to the railyard, but the railyard refused to accept it because the placard on the side of the container was too low. (Tr. 591).

Tejeira learned about the rejected container the next morning. When Herron reported for work on February 6th, Tejeira told Herron that he needed to get the placards fixed. (Tr. 542-543). Herron testified that he took the container to Swift's Roadability facility and that a mechanic there agreed to fix the placard. (Tr. 446).

Herroon testified that he left the container and took another load, assigned to him that morning, to the Port. (Tr. 446-447). Tejeira's testimony painted a different picture. Tejeira claimed that Herron told him that Roadability would not scrape of and replace the placard. When Tejeira told Herron that this was his job, Herron refused, stating that this was not his job. (Tr. 543-544). When Herron continued to refuse to fix the placards, Tejeira reported the incident to Obray. (Tr. 544-545). Obray contacted Swift's corporate headquarters and received authorization to terminate Herron. (Tr. 649).

Later that day, Obray summoned Herron to his office. Tejeira and Mary Raudales, another Driver Manager also attended the meeting. (Tr. 546, 649). Obray told Herron that he was being terminated because he had failed to deliver an assigned load to the railyard the day before and had gone home early instead. (Tr. 649 JX # 12). Herron disputed this, saying that Tejeira had authorized him to leave. (Tr. 441-442). Herron testified that during the meeting he looked at Tejeira for confirmation and that Tejeira simply shrugged. (Tr. 448-449). Tejeira denied this, stating that during the meeting he denied authorizing Herron to leave. (Tr. 549).

Herron testified that he protested that he had not placed the placards on the container and noted that the container had passed through various checkpoints at the Port without any problems. (Tr. 448, 450). Obray did not respond to this, simply stating that the decision had been made. (Tr. 650).

The ALJ accepted Swift's argument that Herron's discharge was the culmination of Obray's growing frustration with Herron's perpetually leaving work early. However, contrary to the ALJ, the record evidence fails to support this conclusion.

There is no evidence that Swift was concerned with Herron's alleged lateness until after he began to act as the drivers' spokesperson. Herron began working at the Wilmington yard in August 2008. According to Tejeira, Herron began abandoning loads and perpetually leaving work early in November 2008. (Tr. 535). While Tejeira claimed he spoke to Herron about this on two separate occasions, his recollection of when this occurred was vague. (Tr. 537-538).

Even more strange is the fact that Tejeira not only made no written record of these conversations, he did not even mention them to Obray. (Tr. 538, 585, 587). The failure to mention it to Terminal Manager Obray is particularly telling, given that Tejeira believed that Herron was intentionally neglecting his duties. This despite the fact that Swift has a progressive disciplinary system it applies to drivers at the Wilmington yard. (Tr. 707, 712).

Obray's initial confrontation with Herron over this issue was also curiously low key. At this point, Tejeira had presumably told Obray that Herron was making a habit of leaving early. Yet, Obray's approach was to appeal to Herron's position as a leader among the other drivers, claiming that Herron leaving early was bad for morale. (Tr. 438).

Obray testified that, following this encounter, he called Swift headquarters seeking permission to discharge Herron. (Tr. 643). However, Swift headquarters told Obray to reprimand Herron instead. (Tr. 644). Yet, even with this directive (and

contrary to the provisions of Swift's policy of progressive discipline [check this out] Obray still did not make a written record of the reprimand that he claimed to have delivered shortly afterwards. (Tr. 707-708).

While the ALJ credited Tejeira over Herron[16], in doing so the ALJ failed to adequately consider the evidence demonstrating that Tejeira deliberately lied to Diego Lopez about Hugo Molina making a list of and reporting to management about drivers who were supposedly goofing off and not working. (See, pp. 19-20, *infra*).

The notion that Tejeira and Obray were concerned over Herron leaving early is further undercut by Tejeira's admission that, when he was supposedly reprimanding Herron for leaving early, most drivers were not working in excess of 8 hours and many were on standby because of low volume. (Tr. 586). Tejeira's admission is significant for two reasons. First, it undercuts Swift's contention that Herron leaving after eight (8) hours was a matter of concern. Second, it is additional evidence that Tejeira's testimony regarding his "warnings" to Herron cannot be trusted.

The notion that Herron refused to comply with Tejeira's directive that he fix the placards on February 6th is similarly suspect. Herron testified that he took the container to Roadability, where a Swift mechanic agreed to fix the placards. For the reasons outlined above, Herron is more credible than Tejeira on this point.

Beyond this, the record evidence suggests that, contrary to Swift's position at the hearing, the placement of the placards would not, absent Herron's union activities, been the basis for discharge. Obray testified that he had observed the container before the

[16] The ALJ only specifically credits Tejeira over Herron regarding the events of February 5th and 6th. ALJD, p. 15, fn. 33. The ALJ repeats her statement regarding Herron's credibility in Footnote 34, but the reference is again to Herron's response to the accusations made against him in the termination interview. However, her decision implicitly credits Tejeira's testimony regarding his alleged reprimand of Herron for leaving early.

night driver took it to the railyard and believed that the placard was too low, but did not instruct the night driver to correct it. (Tr. 718).

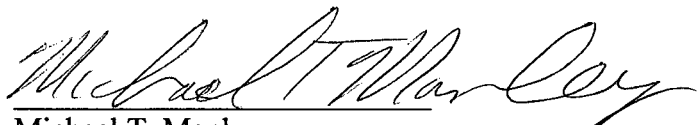
Obray conceded that it was the night driver should have checked the container before leaving the yard to go to the rail yard. (Tr. 719). Obray claimed that he had disciplined the night driver, but could not even recall the driver's name. (Tr.720). Swift failed to produce any evidence of this discipline at the hearing.

The cumulative weight of this evidence suggests that Swift simply seized upon the placard and Herron's leaving early as an excuse to rid itself of an effective and increasingly influential driver spokesperson. The timing of the discharge further strengthens this conclusion. Herron's discharge occurred a mere month after he became highly visible spokesperson for the drivers and only a day after Obray believed he was "ambushed" by Herron during the meeting over Bismark Sanchez. The Board has long found timing to be persuasive evidence of unlawful motivation. *Trump Marina Hotel Casino*, 353 N.L.R.B. No. 93 (2009), *sl. op.* at 11; *Weldon, Williams & Lick, Inc.*, 348 N.L.R.B. 822, 831 (2006); *Sawyer of NAPA*, 300 N.L.R.B. 131, 150 (1990).

CONCLUSION

For all the reasons cited above, the Board should not adopt the ALJ's dismissal of the charges relating to Bismark Sanchez and Anthony Herron, but should find that Swift violated § 8(a)(1) and (3) of the Act.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief In Support of Charging Party's Exceptions to the Decision of the Administrative Law Judge was submitted to the Executive Secretary of the National Labor Relations Board via email on March 1, 2010.

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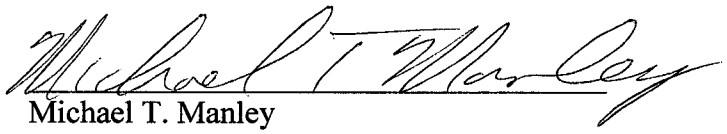

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